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Arthur R. Lasson v. Justus O. Seely : Brief of Respondent

Utah Supreme Court

Case No. 7603

IN THE SUPREME COURT
OF THE
STATE OF UTAH

ARTHUR R. LASSON,
Plaintiff and Respondent,

— vs. —

JUSTUS O. SEELY,
Defendant and Appellant.

RESPONDENT'S BRIEF

Appeal from the District Court of Sanpete County,
State of Utah

Hon. Leland L. Larson, Judge

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INDEX

POINTS

CASES CITED

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RESPONDENT'S BRIEF

I.

ANSWER TO DEFENDANT'S POINTS 3 AND 4— FURTHER FACTS

Panawats Slough is a natural water course with well

defined bed and banks in and through which water has flowed for more than fifty years last past and for a time beyond which the memory of men runneth not to the contrary; and all waters gathered therein from all sources have been appropriated by the plaintiff and his predecessors in interest and applied on lands for irrigation thereof and for stock watering purposes from June 15, each and every year, until December 31 each and every year (Findings 1, 3, JR. 16-30).

That ever since prior to 1894 plaintiff and his predecessors in interest have been the owners, and plaintiff is now the owner, of the right to use said waters of said Panawats Slough (Finding 4, JR. 18-19).

That the water flow in said Panawats Slough is, and at all times in the proceedings mentioned has been, fed from living springs of water of which many are located at and near said water course and by seepage water, also called percolating water, that accumulates in said slough from lands laying at higher altitudes to the east, west, and south thereof and within Sections 5, 6, 7, 8, 9, 16, and 17 in Township 12 South, Range 4 East, Salt Lake Base and Meridian, Sanpete County, Utah (Finding 5, JR. 19).

That said seepage waters, also called percolating water, living springs and all runoff water upon lands laying to the south, west, and east thereof collect and gather into said water course of Panawats Slough and

make the flow thereof; that said flow is not constant and depends in some degree upon the amount of water applied on higher lands for irrigation and the spring waters and the annual rainfall in the surrounding catchment area thereof (Findings 5, JR. 19).

That all times in the proceedings mentioned, and for more than fifty years prior to the institution of this litigation, plaintiff and his predecessors in interest have been, and plaintiff now is, the sole owner and user of all waters which gather into and flow in said Panawats Slough from all sources from June 15 to December 31, each and every year (Finding 3, JR. 17-18).

Plaintiff and his predecessors at all times material to this proceedings, and for more than fifty years last past, have been and the plaintiff now is, the appropriator of the right to use all of the waters of said Panawats Slough and have at all times applied said waters therefrom to beneficial use for irrigation of lands and stock watering purposes (Finding 6, JR. 19).

For more than fifty years last past, the plaintiff and his predecessors in interest have used the water herein specified openly, notoriously, peaceably, uninterruptedly, continuously, exclusively, and adversely to the defendant and his predecessors in interest during all of said time (Finding 7, JR. 20).

That the lands of the plaintiff aforesaid are good

agricultural lands and with the application of water thereon produce valuable crops of wild hay, grain, and alfalfa, but without the application of water thereon from said Panawats Slough said crops will decrease in quantity and quality to the great irreparable damage of the plaintiff (Finding 8, JR. 20).

That on the 29th day of June, 1949, the plaintiff in order to recover his said appropriated water, backed up stream and impounded on the land of the said defendant, which dam was wrongfully and unlawfully constructed by said defendant, was compelled to, and did, go upon said stream in the Southwest quarter of the Southwest Southwest quarter of Section 5, Township 12 South, Range 4 East, Salt Lake Base and Meridian, Sanpete County, Utah, the place where said defendant constructed said dam in said Panawats Slough, and then and there removed a portion of said dam necessary to permit the water to flow to the lands of the plaintiff in said Panawats Slough (Finding 10, JR. 21).

That some time during the spring of 1950, the defendant by his servants and agents caused a substantial part of said dam to be restored and replaced in said channel and that he now threatens, and will, unless enjoined, maintain said dam and place other dams in said channel of said Panawats Slough on his land and without any devices therein to permit the waters of the plaintiff to flow to plaintiff's said lands as said waters have here-

tofore substantially flowed in undiminished quantity (Finding 11, JR. 21).

That the plaintiff on the 29th day of June, 1949, went upon said lands and removed part of the dam placed in said channel by the defendant as aforesaid and defendant suffered no damage thereby, and plaintiff did not trespass upon said lands of the defendant on June 29, 1949 (Finding 13, JR. 22).

The foregoing facts of this case are established by the Findings of Fact herein and are not challenged by the defendant.

II.

FINDINGS NOS. 9 AND 12 ARE SUPPORTED BY THE EVIDENCE

Defendant asserts that the facts in the record are insufficient to sustain Finding No. 9 and Finding No. 12. By defendant's answer, his testimony, and statements of his counsel, defendant claimed the dam in question was to prevent the stream from eroding his land, to take his irrigation water across the slough and irrigate the two to three acres of his said land on the west side of the slough, to use the natural bed of the stream for impounding the seepag waters and all other waters which reached the natural stream and by said means to subirrigate said two to three acres, and to entirely fill up the natural channel of the stream as it has existed for the last fifty

years. He asserts in so doing he will not be interferring with plaintiff's water right, denying plaintiff has any easement, right-of-way or ditch, but is only making reasonable use of his own land. These claims of defendant remind us of the oft repeated phrase—so use your own land as not to injure another. (JR. 8, tr. 211-12).

The assertions of defendant raises certain questions:

First, what is the nature of the Panawats Slough? Second, what is the rate of flow of water therein? Third, has there been erosion from the lands of the defendant? Fourth, what is the source of the water which reached Panawats Slough between June 16 and June 29, 1949, and what is its source at all times?

From the examination of the plaintiff's exhibit "A", one will observe the Denver & Rio Grande right-of-way, along the west side of which, and immediately adjacent to which Panawats Slough is shown paralleling it for about 1100 feet, and thereon will be seen the dam site which caused the trouble in this case. Upon an examination of said exhibit and the plaintiff's Exhibit "C" and "G" (two pictures) will be seen the so-called Panawats Slough.

In answer to these questions the witnesses under oath in substance testified as follows:

A. ARNOLD STEVENS for the defendant: That he was engineer for the Soil Conservation Service, that he knew how to run the transit,

measure land and draw maps; that he prepared a sketch herein (Defendant's Exhibit to which we objected as an unfair representation of the physical feature). Yet he testified that from the railroad bridge across Panawats Slough to the dam shown on Exhibit "A" and Exhibit "I", a distance of 238 feet, there is 8/10 of a foot fall, from the dam to north fence line of the defendant there is 1.2 feet fall, or a total of 2 feet fall in over 1,068 feet, which is less than 1/5 of one per cent fall (tr. 275-7).

B. FRANK SPENCER for the plaintiff: That he is 65 years of age; that he has lived in the vicinity of Indianola 57 years, that he is acquainted with the land of the defendant in question, and the Panawats Slough across the same; that the bed of the Panawats Slough is a natural water course and is covered with a kind of seaweed attached to the bottom of the channel; that no erosion of the channel has taken place since he first saw it in 1900; that the water therein does not run fast enough to cut a channel or make a wash; and that he has never known or seen a dam in said slough on the defendant's land (tr. 34, 40, 49, 50).

GEORGE PETERSON for the plaintiff: That he has lived in Indianola for over 40 years; that during said time he personally knew the Panawats Slough; that he was engaged in agriculture in and about Indianola; that he had never seen a dam in the natural channel of said stream on the defendant's land; that he had never seen any water diverted out of said slough to the land on the west thereof on Seely's land; that he never noticed any erosion of the channel on the de-

fendant's land; that there was vegetation growing in the stream, a kind of seaweed, and that there was a little piece of land west of the slough of the defendant which had never been watered (tr. 53, 55, and 60).

Further on the question of the sufficiency of the evidence to support findings Nos. 9 and 12, the sworn testimony is in part as follows:

ANDREW A. LASSON: That he lives at Birdseye, Utah; that he is a brother of the plaintiff, interested in farming, and familiar with the water of Panawats Slough for over 45 years (tr. 63-64); that on June 28, 1949, he observed the dam in Panawats Slough; that there was all sorts of discarded machinery, manure, hay, dirt, and junk, that the dam was 35 feet across the top from one bank to another running east and west, the thickness of the dam at the bottom was 12 to 14 feet, the top level of the water back of the dam was about 6 feet deep; that he, A. W. Jensen, and Arthur R. Lasson with a steel tape measured the distance the water was backed up by said dam; that in the South Fork it was backed up about 1700 feet to where any movement of water could be observed; and that in the North Fork it was backed up about 1400 feet to where any movement could be observed (tr. 65-67). (On refreshing his memory he gave the distance of 1712 feet on the south course and 1120 feet on the north course [tr. 68]); that there was a measurement of water in front of the dam of 3 feet 5 inches deep (tr. 70); that he observed that there was a loss of wild hay, about 6 tons, from the lack of water in June, 1949, from watering under the Panawats Slough

by his brother, the plaintiff; that the wild hay had a value of $13 in the stack, cost $4 to put it up; that there was also a loss of about $10 in pasture for failure of water during the period of lack of water in June by the dam placed in the stream by the defendant (tr. 72-72).

ARTHUR A. LASSON, plaintiff: That during the last 50 years he has been familiar with the course or appearance of the Panawats Slough (tr. 112); that there has been no erosion in the Panawats Slough on Seely's land during that time (tr. 113); that the width of the channel was from 6 feet 4 inches wide to 10 feet wide where they measured it from the dam north (tr. 325-7); and above the railroad bridge the water backed up was 35 feet wide (tr. 80-83); that all along the bottom of the channel the seaweed was thick; that it was growing to the length of 22 inches attached to the bottom of the channel and the bottom of the channel was in many places filled with the roots of this weed; that some places there was sand and gravel in the bottom and the weeds grew in it; and that in places the weeds slow up the water so a chip on top of the water does not even move (tr. 325-7). (DAVID R. CARLSTON testified in substance the same as Arthur A. Lasson on the condition of the channel [tr. 331-2]). That between the 15th and 17th day of June he was watering a tract of 25 acres growing wild hay, lucern, and grain and that the land needed water; that on the 17th day of June there was 1.36 c.f.s. of water and that on the 21st day of June only .34 c.f.s. of water, not enough to reach his crop (tr. 121, 133); that for a period of about 8 days from the 18th day of June to the 29th day of June he lost the

flow of the stream which was between ½ second foot or 34/100 c.f.s. and 1.36 second feet by virtue of the dam placed in the stream by the defendant (tr. 117-118, 124-5, 126-32, 184-186). That it cost him to take out said dam $20.00 (tr. 121). His other testimony on damages was in substance as given in defendant's brief except that after June 15 he applied all the water of Panawats Slough on his land (tr. 182). The water backed up by the dam 1700 feet in one channel and 1100 feet in the other (tr. 139), distance measured by chain measurement on the ground (tr. 139-141).

That he watered sixty-five acres of land described in his complaint with water of Panawats Slough (tr. 149); that he diverts the water from Panawats Slough just north of the Sanpete County line in Utah County, Utah, and no other user takes directly from Panawats Slough; the water is figured with the water from Thistle Creek, Clear Creek and Rock Creek. He uses the water from Panawats Slough, and the water from said creeks are brought together and divided between the lower canyon users (tr. 105); that he has the right to use all waters from Panawats Slough from the 15th day of June to March 1 of each succeeding year; that he has been familiar with the use of the water from Panawats Slough since the year 1900 (tr. 106).

JUSTUS O. SEELY, the defendant: He is a stockholder in the Indianola Irrigation Company and has a right to the use of the waters of Thistle Creek at certain times and irrigates the 160 acres of land down to the railroad track on the west forty (tr. 287, 288). Spring runoff starts as early

as the 1st day of April and holds up pretty well to the first of June, and the water is taken out of Thistle Creek in the Meeting house ditch which brings the water down to you, Seely (tr. 289). He has not spread the water out on the land, west forty, west of Panawats Slough (tr. 293). That he had a water turn from the Indianola Irrigation Company between June 15th at 6:00 o'clock a.m. to June 18th at 4 o'clock p.m.; but he did not know whether any of that flowed over the surface and into Panawats Slough (tr. 306-7); that during May, June, and July (1949) he saw the seepage water coming out of the banks of the Panawats Slough and into it (tr. 312); and that it was between June 15th to the 18th that he placed the dam in the channel and placed the hay and manure in front of the same; that he never installed any measuring device any place (tr. 313). He commenced putting in the dam in Panawats Slough in 1948 and till 1949, and unless restrained will fill up the slough between the perpendicular banks (tr. 294) to stop erosion (tr. 296).

Cross examination:

"Q. You have no doubt in your mind, but what the water you call the meadow stream, which flows across the lower three forties, which you and your counsel have been talking about, finds its way into Panawats Slough?

"A. Sure it does." (tr. 310).

"Q. Any excess water which has been applied upon those lands in the past has gone over the land and into the Panawats Slough?

"A. To the best of my knowledge. Yes." (tr. 310).

"Q. During the time you have seen water coming out of the banks, and I am not talking of that on the surface, but I am talking about that coming from the banks of the channel."

"MR. WOOLLEY: When it goes into the ground and then into the channel it is yours." (tr. 312).

Reference is made to the Smith Decree, plaintiff's Exhibit "I", the decree of 1894. For a further understanding of the problem we quote a part of it as follows:

"* * * It is here, * * * ordered, adjudged and decreed, that the plaintiffs Edward Simons, Adelbert Simons, Charles Whitman, Henry Gardner, William Collett, Ole Larsen, Andrew Larsen, (should be Lasson), Niels Larsen (should be Lasson), August Hjorth, and defendant James Pant, Indian, are the owners and entitled to the use of all the waters of Thistle Creek, and ¼ of the water of Clear Creek and Rock Creek for a period of five days from six o'clock a.m., on the 25th day of June until six o'clock a.m., on the 30th day of June, and for a period of five days from 6 o'clock a.m. on the 10th day of July until 6 o'clock a.m. of the 15th day of July of each and every year, and in addition thereto, that the said plaintiffs and defendant James Pant, Indian, are during all of the remaining portion of each and every year from the first day of March until the 15th day of June, owners of and entitled * * * together with the said waste water of Panawats ditch * * * (and)

all the waters flowing in the stream known as Panawats Slough * * *''

The foregoing facts appear to us ample to support findings of fact Nos. 9 and 12.

By way of further explanation as to the background of this case, may we say that the scene is laid in Indianola Valley, Sanpete County, Utah. Said valley is round and about three miles by three miles.

To the east and west thereof are the large Wasatch Mountains extending approximately 3 to 4 miles on either side thereof from which the waters drain into the valley. In the northeast corner of the valley are three creeks, the two small ones, Clear Creek and Rock Creek, originate in Utah County and join Thistle Creek near the northeastern portion of the valley. Up to June 15th of each and every year, or when the high water season closes, all of the waters of these three creeks pursuant to the above mentioned Smith Decree have been diverted from their natural channel in the northeast portion of said valley and spread out to the south and west across the lands on the east and south side of said valley. Some of these waters are what is called the Canyon Waters and have flowed down to and across the meadow lands adjacent to the Panawats Slough over the period of years, and so long as the accumulated flow in said Panawats Slough at the weir in the northwest part of said valley equaled one-half of the total flow of these three creeks in the northeast portion of the valley, said waters were

permitted to so flow. Some of these waters would store themselves in the meadow lands and would percolate therefrom into the Panawats Slough, making part of the waters that are involved herein.

Panawats Slough is the lowest part of the valley to which all of the waters of the valley drain, and the plaintiff is the first to divert water therefrom. His diversion is where the water goes down through what is called the canyon to join the Spanish Fork River at Thistle, Utah.

III — ARGUMENT

ANSWER TO APPELLANT'S POINTS 1 AND 2— DECREE IS NOT CONTRARY TO LAW

Our study upon this question has produced no case directly in point or decisive of the problems involved. We have read all of the cases referred to by the appellant and find that none of those are directly in point.

It appears to us that there are several Utah cases, not referred to in the Appellant's brief, which will be helpful to the court.

At the outset of this case it was stipulated that the land in question of the defendant was patented in 1878 and that the patent contained the usual provisions, that the land was subject to the vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and the rights to ditches and reservoirs as

existed at that time. While no definite record information appears herein as to when the lands of the plaintiff and other users in the canyon were irrigated, it does appear that they had been irrigated for many years prior to 1894; and that Panawats Slough had existed beyond the time when the memory of man runneth not to the contrary; and that the water rights accrued therein were adjudicated in 1894. It appears to us that the reservation of the patent refers to lands which are watered from that stream.

This history of the doctrine of a reservation or easement for the lower irrigator is ably and fully covered in the case referred to by the appellant, *Snake Creek Mining and Tunnel Company v. Midway Irrigation Company,* 260 U.S. 596, 43 S. Ct. 215, 67 L. ed. 4423. It traces the doctrine and enactments of the Congress of the U.S. and the Acts of the State of Utah beginning as early as 1866.

> "The court reviewed the enactments we have set forth above, said they should not be narrowly construed, and held (11 Utah, 443, 40 Pac. 710, 30 L.R.A. 186):
>
> "In our opinion, wherever the industry of the pioneer has appropriated a source of water, either on the surface of or under the public lands, he and his successors acquire an easement and right to take and use such water to the extent indicated by the original appropriation, and that a private owner who subsequently acquires the land takes it burdened with this easement, and we also hold that this easement carries with it such rights of

ingress and egress as are necessary to its proper enjoyment."

This court in a somewhat similar case, where the waters of a natural stream seeped into the stream from surface bodies of water along its course, held when the waters of the stream were appropriated the waters along its course which seeped into it were appropriated.

> "It is settled in this arid region by abundant authority that when the waters of a natural stream have been appropriated according to law, and put to a beneficial use, the rights thus acquired carry with them an interest in the stream from the points where the waters are diverted from the natural channel to the source from which the supply is obtained, and any interference with the stream by a party having no interest therein that materially deteriorates the water in quantity or quality previously appropriated, to the damage of those entitled to its use, is unlawful and actionable." *Cole v. Richards Irrig. Co.,* 27 U. 205, 75 P. 376.
>
> "It is a well-recognized principle of law in this region that, when the waters of a natural stream have been appropriated according to law and the waters put to a beneficial use, the appropriator acquires a vested right in the stream to the extent of his appropriation, and such right carries with it an interest in the stream to the source from which the supply is obtained."
>
> *Chandler v. Utah Copper Co.,* 43 U. 479; 135 Pac. 106. Approved in *Holman v. Christensen,* 73 U. 389, 274 Pac. 457.

Likewise this court considered what should be done where the onwer of lands found them becoming marshy after the higher lands were irrigated, and such waters which came to the surface upon the owners lands were tributary to the natural channel, restrained the owner from digging upon his own lands and diverting said waters to his own lands away from the stream.

> "Where seepage waters which would otherwise return to a stream and were part of the source of supply can be used by plaintiff on whose lands they collected, he may use them so long as such diversion does not prevent their return to the stream and injure the lower prior appropriator." *Rasmussen v. Moroni Irr. Company,* 56 Utah 140, 189 P. 572.

To the same effect are later Utah cases in which it has been held:

> "Under both common-law doctrine of reparian right or ownership and the doctrine of appropriation, one located nearer to the source was not permitted to cut off interrupt or diminish * * * the source." *Wrathall v. Johnson et al,* 86 U. 50 at p. 74; 40 P 2d 755.

The plaintiff has not contended in this case that the defendant may not control his irrigation water upon his own property. If defendant wishes to transport said waters across Panawats Slough, or through the said ditch, he may do so by accurate measurements and suitable structures which do not diminish plaintiff's appropriated water in Panawats Slough.

In this case for ten days the defendant dammed off the waters of Panawats Slough behind his dam, the lower part of which was impervious to water for a height of 3-½ to 6 feet; and the waters raised behind said dam until they could trickle through its porous contents near the top and along the sides (tr. 29, 66, 80, 83). Said dam backed up the waters for over a quarter of a mile behind said dam, and some of the waters escaped to sub-irrigate the dry lands of the defendant which he wanted to sub-irrigate (tr. .....). But the record shows without contradiction that he did not even know that any of his irrigation waters had reached the channel, and affirmatively shows that he did not make any provision to determine the amount of water, if any of his irrigation water reached Panawats Slough and what amount it was. The claim of the defendant's brief that the dam filled up by the spring waters was not found by the court and is not even supported by the defendant's own testimony.

We are unable to determine whether or not the defendant claims that the percolating waters upon his own land is his; and if he can capture it upon his own lands in the natural channel of Panawats Slough, it is his still, and that he can insert a dam therein and make it continue on the other side of the channel, or down its course, or to hold it back in his land for all of said uses. If so, we think the rule announced in the case of *Rasmussen v. Moroni Irrig. Co.*, supra, is strengthened by the rule of artesian basin waters.

> "Prior appropriation of percolating waters from 'artesian basin' which is a body of water more or less compact, moving through soil with more or less resistance, held, entitled to restrain adjoining land owner from pumping water from wells on his property so as to diminish the flow

of appropriator's wells. Justesen v. Olsen, et al 40 P. 2nd 802, 86 Utah 158."

The appellant seems to assert that the plaintiff's claim is that defendant has no right to control his water on his own land, 155 acres lying east of Panawats Slough and the railroad track. This is not the claim of the plaintiff. The claim of plaintiff is that any and all waters which escape from defendant's land by percolation, seepage, and run off, that finds its way into the Panawats Slough is the appropriated water of the plaintiff; and defendant may not diminish nor interfere with the flow thereof.

Our position is well stated by observations of Justice Larson in *Sigurd City vs. State,* 105 Ut. 278, 142 P 2d 154:

> "This is a case where Nebeker appropriated the entire flow of the stream and all its tributaries at and above the meadows. The natural channels therefore from the source to the meadows were part and parcel of his ditches and conveying channels, and the waters thereof were no longer subject to appropriation as public water flowing in a natural channel, unless he failed to put them to a beneficial use." (citations). "He has an interest

in the stream for his part of diversion to its source." (citations).

> "As such sole appropriator of all the waters of the creek from its sources to the meadow, he was entitled to all the waters, although seeping or flowing underground, which were part of and tributary to the stream flowing in the natural channel above the ground." (citations).

It appears to plaintiff that defendant plans to appropriate the waters of Panawats Slough if he be allowed to fill the natural channel so that water will flood over his land which is situated west of the Panawats Slough, and has never been irrigated.

IV.

DEFENDANT'S ANSWER TO POINT 5—NO RIGHTS DEPEND ON TRESPASS HEREIN

The appellant argues (point 5) that plaintiff had no right to go upon the land of the appellant and remove the dam heretofore described in the case, so that plaintiff could have his waters flow to his lands unobstructed and undiminished. His authorities cited therein are not the law in Utah.

This case is not a problem of appropriation of waters before the State Engineer, or the use of unappropriated waters. It, therefore, appears that *Tanner v. Bacon,* 103 U. 494, 136 Pac. 957 is not in point; and in the main *Riorden v. Westwood et al* ..... U. ....., 203 P 2d

922, does not support defendant. On the contrary in the *Riorden v. Westwood* case the court in the prevailing opinion refers to said contention of the defendant, that the rights may not be initiated in trespass for which he cites *Jones et ux v. McIntire,* 60 Idaho 228, 91 P 2d 373 and other citations. Upon this contention our court held therein "that doctrine although several times discussed has not been approved by this court." (at p. 930-1 thereof).

Likewise, we do not see any constitutional question of taking private property without just compensation in this case; and accordingly the case of *Bountiful City v. DeLuca et al,* 77 U. 107, 292 P. 194 is not in point. We are aware that language is used in this case as referred to in the *Adams et al v. Portage Irrig. Res. & Power Co., et al,* 95 U. 20, 81 P 2d 368, which might imply the plaintiff could not claim the water was his in the natural channel. It is our view the facts of those cases distinguish themselves from the facts of this case, and the cases cited earlier in our brief are controlling.

In any event it appears to us plaintiff had the right to go upon defendant's land and remove the dam to minimize his damages.

V.
CONCLUSIONS

The decree in this case is liberal in its term towards the defendant. It provides the defendant may construct

his check dams in said natural channel if necessary to arrest the speed of the water flow therein and protect the existing bed and perpendicular banks from caving. However, if said defendant should construct check dams in said channel, they must be so placed therein as not to destroy the present perpendicular banks or alter the bed of said stream, or appreciably interfere with or obstruct the usual, ordinary and continuous flow of water therein to the plaintiff's land aforesaid.

When defendant has not accepted the terms of the decree herein we can reach no other conclusions than he intends to appropriate or acquire the water rights of the plaintiff with which to water his two to three acres dry grass lands west of Panawats Slough, and to prevent the seepage and percolating waters from going into said stream as it has gone for over fifty years last past.

Accordingly we respectfully submit the findings of fact, and conclusions of law should be sustained, and the decree affirmed.

Respectfully submitted this .... day of January, 1951.

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